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December 26, 2000

Magalie Roman Salas
Federal Communications Commission
224 12th Street, SW
TW-B204
Washington, DC 20554

Re: Review of Commission Consideration of Applications under the Cable Landing License Act (IB Docket No. 00-106)

Dear Ms. Salas:

Please file the attached letter in the public record in the above captioned proceeding. Please contact me if you have any questions.

Yours truly,

David Lawson /FB

David Lawson

Attachment

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December 26, 2000

Marilyn Simon
International Bureau
Federal Communications Commission
224 12th Street, SW
Room 6-A767
Washington, DC 20554

Re: Review of Commission Consideration of Applications under the Cable Landing License Act (IB Docket No. 00-106)

Dear Marilyn:

I enjoyed our December 20, 2000 discussion of submarine cable economics and the many theories that Global Crossing and others have advanced for continued entry regulation. As you know, my view is that standard economic principles applied to these marketplace realities strongly counsel in favor of a rule that new cables – both open investment cables and closed investment cables – are deemed presumptively pro-competitive, and that exceptions to expedited approval should be rare. Although I have great respect for Andy Joskow, the economic theories he and Global Crossing have advanced here simply do not fit the known marketplace facts.

A good example of this is the theory that the large owner-carriers on an open investment cable might have the incentive anticompetitively to delay expanding capacity. As I understand it, the theory is that the owners of a consortium cable would have a collective incentive to delay expansion of a cable in order to create artificial scarcity on the route and that, as a result, the owners of the cable would be able to charge higher rates for their retail services.

As an initial matter, this theory cannot be reconciled with the most recent data from the 1999 FCC Section 43.82 Circuit Status Data (December 19, 2000) showing explosive growth in submarine cable capacity. The new report shows that: (1) total available submarine capacity at year-end 1999, 3.5 million 64 Kbps circuits, was almost three times the capacity at

year-end 1998 (1.2 million circuits), more than six times the capacity at year-end 1997 (0.6 million circuits), and more than twelve times the capacity at year-end 1995 (0.3 million circuits); (2) the initial capacity of the twelve new submarine cables authorized by the Commission will increase year-end 1999 capacity by more than three times by year-end 2000 (to 11.5 million 64 Kbps circuits), by more than seven times by year-end 2001 (to 25.6 million circuits), and by almost ten times by year-end 2002 (to 33.8 million circuits); and (3) 303.5 million additional circuits (and 337 million total circuits) would be provided by upgrading these existing and planned cables to their full potential capacity – which would increase year-end 1999 capacity *by more than 85 times*. *See* Table 7 and Note. In addition, the recent report shows that any regulation of ownership voting on capacity increases would only govern a tiny proportion of total upgradeable capacity because only 6.4 percent (19.5 million) of these 303.5 million additional upgradeable circuits are on consortium (open investment) cables and 93 percent (284 million) are on non-consortium (closed investment) cables. *See* Note to Table 7.[1]

I also believe this scenario is highly unlikely as a matter of economic theory. By definition, the strategy is costly. It requires the owner-carriers to forego expansion that would allow them to carry more traffic (and, accordingly, increase the volume of their retail services). But in today's dynamic marketplace, they are unlikely to gain anything from this strategy. As Mr. Meyers explained during our meeting, each of the three major regions are served not only by at least one large open investment cable, but also by a number of private cables. In addition, several new cables (with even greater capacity than existing cables) are being deployed. Thus, if a particular open investment cable were to forego efficient expansion of capacity, the only thing that this strategy would accomplish is to shift traffic to the many other competing cables.[2]

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[1] I am impelled to note that the report shows that 85 percent of new submarine cable circuits in 1999 were non-IMTS circuits (and that 75 percent of total active submarine cable circuits were non-IMTS). *See* Table 2. These data are completely inconsistent with Global Crossing's claims that operating agreements are bottleneck facilities, because such data traffic is not carried pursuant to operating agreements.

[2] In this regard it is important to emphasize that existing submarine cables can serve this demand by quickly and cheaply upgrading capacity. In addition, as has repeatedly been the experience in this industry, numerous companies stand ready to build new cables to serve demand that cannot be handled by existing capacity.

Perhaps even more importantly, open investment cables place no restrictions on the ability of the owners to invest in capacity *outside* the joint venture. In other words, while a joint decisionmaking process is necessary to upgrade a particular cable, no individual carrier is precluded from buying capacity on any other cable or building its own cable. Knowing this, the owners of an open investment cable have no incentive to delay the deployment of capacity for which there is adequate demand. It is for these reasons that the *Antitrust Guidelines for Collaborations Among Competitors* find that a joint venture is much less likely to raise competitive concern when the joint venture is not exclusive and participants are permitted to compete with the venture. *See Antitrust Guidelines for Collaborations Among Competitors* § 3.34(a).

Not only is there no apparent public interest benefit in micro-managing the decision rules employed by an open investment cable for its upgrades, there could be substantial public interest harms from such regulation. As I explained in my initial declaration, empowering a group of owner-carriers to trigger expansion creates the possibility of a classic free rider problem. If a subset of the owners are empowered to force a capacity upgrade and purchase capacity at the incremental cost, carriers potentially would have an incentive to make a smaller initial investment than otherwise. The likely result would be underinvestment – if the construction of the cable survived these misincentives in the first instance.

Finally, I should note that any focus in this context on open investment cables seems particularly misguided. As you know, the provisions governing capacity expansion are negotiated *ex ante* by all of the owners of the consortium cable. In this competitive environment, carriers are unlikely to agree to join a cable that is unlikely to expand when competitive conditions warrant additional capacity. On the other hand, the carriers on private cables get no say in when that cable is expanded.

I hope you find this information helpful, and I look forward to working with you further.

Sincerely,

Bobby Willig

cc: Donald Abelson
Rebecca Arbogast
Ari Fitzgerald
Cathy Hsu
Elizabeth Nightingale
Jackie Ruff
Douglas Webbink